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SUPREME COURT

# Supreme Court of Wisconsin

NO. 22AP91

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RICHARD TEIGEN and RICHARD THOM,

Plaintiffs-Respondents-Petitioners,

vs.

WISCONSIN ELECTIONS COMMISSION,

Defendant-Co-Appellant,

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,

Intervenor-Defendant-Co-Appellant, and

DISABILITY RIGHTS WISCONSIN, WISCONSIN FAITH  
VOICES FOR JUSTICE and LEAGUE OF WOMEN VOTERS OF  
WISCONSIN,

Intervenors-Defendants-Appellants.

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On Appeal from the Circuit Court for Waukesha County  
The Honorable Michael O. Bohren, Presiding  
Circuit Court Case No. 2021CV958

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**BRIEF OF INTERVENOR-DEFENDANT-CO-APPELLANT  
DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE**

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## ISSUES PRESENTED

1. Does Wis. Stat. § 6.855, which governs “alternate absentee ballot site[s],” apply to drop boxes even though voters may not “request and vote” absentee ballots from such boxes?

The circuit court answered yes.

2. Does Wis. Stat. § 6.87(4)(b)1, which requires absentee ballots to be “mailed by the elector, or delivered in person, to the municipal clerk” or the clerk’s authorized representatives, allow a clerk or authorized representative to accept “delivery” outside the four walls of the clerk’s office?

The circuit court answered no.

3. Must drop boxes, to the extent they are otherwise permissible, always be “staffed” by the clerk or the clerk’s authorized representatives, no matter how secure and well monitored they are?

The Circuit Court answered yes.

4. Is this an appropriate case to resolve the far-reaching objections of Mr. Teigen and Mr. Thom to voters’ reliance on authorized agents (including family, friends, and neighbors) in mailing or returning absentee ballots, given that the only challenged Wisconsin Elections Commission “guidance” before this Court is a single sentence in a March 31, 2020 letter released at the beginning of the pandemic under lock-down conditions shortly before the April 7, 2020 election?

The Circuit Court implicitly answered yes.

5. Do Mr. Teigen and Mr. Thom have standing to pursue their claims?

The Circuit Court answered yes.

## INTRODUCTION

Wis. Stat. § 6.87(4)(b)1 requires voters to mark and return their absentee ballots in sealed envelopes “mailed by the elector[s], or delivered in person, to the municipal clerk issuing the ballot or ballots.” Defendant-Co-Appellant Wisconsin Elections Commission (WEC) interprets this language to mean that voters may deliver their voted sealed ballots to the municipal clerk by (1) handing them to the clerk or one of the clerk’s duly authorized representatives, or (2) depositing them into secure receptacles designated and maintained by the clerk and under the clerk’s jurisdiction, control, and supervision. This eminently reasonable interpretation of delivery “to the municipal clerk” is well within WEC’s authority to administer Wisconsin’s election laws and provide guidance to local election officials. *See* Wis. Stat. § 5.05(1), (2w), (5t), (6a).

Richard Teigen and Richard Thom are two voters who reside in Waukesha County. They contend that WEC’s reading violates the supposedly “plain language” of Section 6.87(4)(b)1 and related provisions, but their arguments as to what that plain language means have changed significantly during the course of this litigation. Teigen and Thom initially insisted that municipal clerks may *never* use drop boxes under *any* circumstances—no matter how safe and secure such boxes might be; how rigorously clerks might monitor and supervise their use; how closely such boxes might adhere to best-industry practices; or how much such drop boxes might facilitate the safe, secure, and convenient “in person” return by voters of their voted ballots “to” municipal clerks and their authorized representatives, in the manner prescribed by the clerks. Teigen and Thom argued at the outset that the

statute literally requires the voter to “hand[] the envelope containing the ballot in person to the municipal clerk” (or an “authorized representative” under the definition of “municipal clerk” in Wis. Stat. § 5.02(10)). Compl. ¶ 4, Appellants’ Joint Appendix (Jt. App.) 9 (emphasis added).<sup>1</sup> And that hand-to-hand delivery of the envelope, they added, must occur only “at the office of the municipal clerk or at an alternate site designated under Wis. Stat. § 6.855.” Compl. at 11 (emphasis added), Jt. App. 18; *see id.* ¶¶ 34, 38, 56, Jt. App. 14, 17.

Messrs. Teigen and Thom have retreated from this *per se* opposition to drop boxes. They conceded in their opening summary judgment brief that “[p]utting a ballot into a secure box” can indeed constitute delivery “to” the clerk, but insisted that any such drop box must be “staffed and located at the municipal clerk’s office (or a properly designated alternate site).” Plaintiffs’ SJ Br. at 11 n.2, Jt. App. 85. Teigen and Thom added in their reply brief that staffed drop boxes *inside* clerk’s offices are permissible even though the election statutes nowhere mention the use of such boxes, an omission they dismissed as an inconsequential “detail.” Plaintiffs’ SJ Reply Br. at 4 n.1, Jt. App. 465 (“Whether the voter physically places the ballot into the clerk’s hand or into some receptacle in the presence and view of the clerk is *not a detail that the statute addresses.*”) (emphasis added). The Circuit Court agreed that drop boxes are lawful even though nowhere mentioned in the election statutes, but only where they are “staffed by the clerk and

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<sup>1</sup> Section 5.02(10) provides: “Municipal clerk’ means the city clerk, town clerk, village clerk and the executive director of the city election commission *and their authorized representatives*. Where applicable, ‘municipal clerk’ also includes the clerk of a school district” (emphasis added).

located at the office of the clerk or a properly designated alternate site under Wis. Stat. § 6.855.” Jan. 20, 2022 Order at 2, Jt. App. 640.

Respectfully, it is Mr. Teigen, Mr. Thom, and the Circuit Court, not WEC or the intervenor-defendant-appellants, who are attempting to rewrite the relevant statutory language. If deposit into a secure, monitored drop box can constitute the “in person” return of the sealed ballot envelope “to the municipal clerk”—as Teigen and Thom now concede—nothing in Section 6.87(4)(b)1 or elsewhere requires that such drop boxes must necessarily be *inside* the clerk’s office. “[D]elivery in person, to the municipal clerk” also can be accomplished outside the clerk’s office, such as into curbside drop boxes in front of the clerk’s office staffed by the clerk’s authorized representatives; other staffed drive-through sites that facilitate the efficient and safe return of sealed ballots; and drop boxes located in high-traffic pedestrian locations, such as at a public library. Some unstaffed return sites are equally secure, such as an after-hours depository drawer on the outside wall of the municipal clerk’s office; municipal infrastructure used to collect after-hours tax and utility payments; or a secure metal fixture bolted to the sidewalk, similar to a U.S. mailbox.

DSCC joins the briefs of the WEC and the Disability Rights Wisconsin (DRW) appellants in full, and has sought in this brief to minimize duplicating the arguments ably developed in those briefs.<sup>2</sup> DSCC will focus on three points. *First*, DSCC will offer additional

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<sup>2</sup> In particular, DSCC agrees with the WEC and DRW appellants that the two challenged WEC guidance memos do not themselves constitute “rules” subject to the formal rulemaking requirements of Wis. Stat. ch. 227. DSCC joins in full in these arguments by WEC and the DRW appellants, and will not address the rulemaking issues further.

statutory construction arguments and authorities in support of the WEC's conclusion that municipal clerks may rely on secure, monitored absentee-ballot drop boxes to facilitate the in-person return "delivery" of sealed absentee ballots, whether such depositories are inside or outside of clerks' offices and whether they are staffed or unstaffed.

*Second*, DSCC agrees with the other appellants (and joins in their arguments) that this Court should reverse the Circuit Court's holding that "an elector must personally mail or deliver his or her own absentee ballot, except where the law explicitly authorizes an agent to act on an elector's behalf." Jan. 20, 2022 Order at 2, Jt. App. 640. The only jurisdictional "hook" for this sweeping and unprecedented ruling is a single sentence in the WEC's March 31, 2020 guidance letter issued at the onset of the pandemic under lock-down conditions only a week before the spring election. Jt. App. 20; Compl. ¶ 8, Jt. App. 9-10. This part of Messrs. Teigen and Thom's case, in particular, smacks of a request for an advisory opinion resting on a woefully inadequate factual record without careful consideration of the ways in which an unqualified ballot-assistance ban will operate to disenfranchise voters. As this Court emphasized last year, it is not "on-call to answer questions from citizens, legislators, or executive branch officials whenever the answer to a statutory question is unclear"; "[i]t is not our institutional role to step in and answer every unsettled and interesting legal question with statewide impact." Order at 4, *Fabick v. Wis. Elections Comm'n*, No. 2021AP428-OA (Wis. June 25, 2021).

*Third*, as this Court also reiterated in *Fabick*, "someone making a claim must have some recognized legal interest he or she seeks to vindicate, and standing to raise that claim." *Id.* Mr. Teigen and Mr.



Thom lack either “voter standing” or “taxpayer standing” to pursue their claims under Wisconsin law.

### **ORAL ARGUMENT AND PUBLICATION**

Because of its obvious importance, this appeal warrants oral argument and the Court’s opinion should be published in the official reports.

### **STATEMENT OF THE CASE**

#### **A. The widespread reliance on drop boxes by Wisconsin’s local election officials and voters.**

Although the November 2020 election occurred during the worst global pandemic in over a century, it also simultaneously saw one of the highest turnouts of Wisconsin voters in 70 years, with nearly 73% of Wisconsin’s voting-age citizens casting ballots and making themselves heard. Jt. App. 111. That extraordinary turnout in the midst of an unprecedented public-health crisis was facilitated in part by the widespread availability of carefully monitored secure drop boxes, in which voters could safely deposit their voted ballots, confident that those ballots would reach election officials in time to be counted. “[T]he use of secure absentee ballot drop boxes is an accepted elections practice in the United States that far predates the 2020 elections cycle”; “[t]he majority of states employ drop boxes and many states have been using them for years.” Jt. App. 113. As described by the WEC:

A ballot drop box provides a secure and convenient means for voters to return their by mail absentee ballot. A drop box is a secure, locked structure operated by local election officials. Voters may deposit their ballot in a drop box at any time after they receive it in the mail up to the time of the last ballot collection Election Day. Ballot drop boxes can be staffed or unstaffed, temporary or permanent. . . . Ballot

drop boxes and drop-off locations allow voters to deliver their ballots in person.

Jt. App. 23. Drop boxes were used in Wisconsin's 2020 elections in a variety of locations, including inside municipal clerk's offices and other government buildings, at drive-through and curbside locations staffed by election officials, and in the form of steel boxes "permanently cemented into the ground" in high-demand areas, under video surveillance. Jt. App. 23-25.

Municipal clerks and voters turned to secure drop boxes for many reasons. Such boxes enabled voters (including those particularly at risk, such as senior citizens, voters with immune disorders, those with disabilities, parents of young children, health-care and elder-care workers, et al.) to participate in the election without having to risk exposure (or risk exposing others) to COVID-19. Jt. App. 117. Many voters also relied on drop boxes because they "lack[ed] trust in the postal process, fear[ed] that their ballot could be tampered with," and were "concerned about ensuring that their ballot [was] returned in time to be counted." Jt. App. 23. There were serious breakdowns in mail delivery by the U.S. Postal Service in connection with Wisconsin's April 2020 primary—service problems that continued through the year and were the subject of scathing reports by the USPS Office of Inspector General.<sup>3</sup>

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<sup>3</sup> See Jt. App. 120-70. These postal problems caused the late delivery of literally tens of thousands of ballots throughout the state in the April 2020 election—ballots that would have been disqualified but for a federal court order extending by six days the ballot-receipt deadline for ballots postmarked on or before election day. See *DNC v. Bostelmann*, 451 F. Supp. 3d 952, 975-77, 983 (W.D. Wis.), *stayed in part*, Nos. 20-1538, 20-1539, 20-1545, 20-1546, 2020 WL 3619499 (7th Cir. Apr. 3), *stayed in part sub nom. RNC v. DNC*, 140 S. Ct. 1205 (2020). The WEC determined after the spring

USPS warned of a “significant risk” that ballots sent through the mail in the weeks leading up to the November election might be late and go uncounted. Jt. App. 198.

Mr. Teigen and Mr. Thom throughout this litigation have attempted to paint a picture of “unstaffed,” “unsupervised,” and “untended” drop boxes “invit[ing] fraud and abuse.” Compl. ¶¶ 11, 52, Jt. App. 10, 16. Nothing could be further from the truth. Many drop boxes throughout the state were located inside clerk’s offices and monitored by authorized personnel “in real time”; many others were fully staffed and monitored by election officials *outside* of clerks’ offices, such as temporary drive-through ballot drop-off locations. Jt. App. 25. WEC’s guidance for “unstaffed” drop boxes followed “best practices [that were] based on advice from the Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency [CISA] and included instructions about drop box security and chain of custody procedures for securely emptying the drop boxes on a regular basis.” Jt. App. 200; *see also* Jt. App. 23-26, 204 (CISA guidance “on how to administer and secure election infrastructure in light of the COVID-19 pandemic”). These “best practices” included using secure locks, sealing “all drop boxes ... with one or more tamper evident seals,” monitoring drop-box sites with “video surveillance cameras” or local law enforcement surveillance, using “Election signage,” and securely collecting and transporting ballots to the clerk’s office. Jt. App. 25-26.

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election that the six-day extension (as modified on appeal) had prevented the disqualification of nearly 80,000 valid ballots that had been timely cast on or before election day but not received until after. *See* Jt. App. 178.

Secure drop boxes were popular with Wisconsin election officials and voters throughout the state. Over 500 secure drop boxes were used in nearly all 72 counties in the weeks leading up to the November election. Compl. ¶ 13, Jt. App. 10; *see* Jt. App. 213-15. Teigen and Thom have failed to allege or prove a single instance of attempted ballot-tampering, ballot theft, or other abuses related to the use of ballot drop boxes during last year's elections. The closest they come is claiming that drop boxes "cast doubt on the integrity of upcoming elections" and "erode confidence in the process"—without providing evidence of specific problems or addressing WEC's many safeguards to ensure ballot security, election integrity, and voter confidence. Plaintiffs' SJ Br. at 3, Jt. App. 295. But these are not new or novel claims. Following the November 2020 election, several lawsuits challenged drop-box voting in Wisconsin. All failed.<sup>4</sup>

Secure drop boxes were among the few things that most Democrats, Republicans, and Independents seem to have agreed upon during 2020's historically contentious elections. *See* Chris Rickert, *Despite objections from conservatives, clerks in Trump country embraced ballot drop boxes, too*, Wis. State J. (Nov. 4, 2021), reprinted as Jt. App. 217-232. In late September 2020, State Assembly Speaker Robin Vos and then-State Senate Majority Leader Scott Fitzgerald publicly emphasized they "*wholeheartedly support[ed]* voters' use" of "authorized 'drop boxes,'" praising such boxes as a "convenient, secure, and *expressly*

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<sup>4</sup> *See, e.g., Mueller v. Jacobs*, No. 2020AP1958-OA (Wis. Dec. 3, 2020); *Trump v. Wis. Elections Comm'n*, 506 F. Supp. 3d 620 (E.D. Wis.), *aff'd*, 983 F.3d 919 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1516 (2021); *Fabick v. Wis. Elections Comm'n*, No. 2021AP428-OA (Wis. June 25, 2021).

*authorized* absentee-ballot-return method[.]” Letter from Misha Tseytlin to Maribeth Witzel-Behl, City Clerk, City of Madison (Sept. 25, 2020) (emphasis added), reprinted as Jt. App. 234.<sup>5</sup> And in defending against challenges to other aspects of Wisconsin’s election laws, the Wisconsin Legislature itself represented to the U.S. Supreme Court that “Wisconsin law gives all eligible voters multiple avenues to vote,” *including* by “return[ing] their ballots . . . via a ‘drop box’ where available.” Jt. App. 238-39. At no point did the Legislature suggest that reliance on such drop boxes might actually be illegal under Wisconsin law, or restricted to drop boxes located inside the municipal clerk’s offices in the presence of authorized staff. The Legislature’s arguments led Justice Gorsuch to praise Wisconsin’s reliance on secure drop boxes, both indoors and out:

Returning an absentee ballot in Wisconsin is also easy. ... Until election day, voters may, for example, hand-deliver their absentee ballots to the municipal clerk’s office or other designated site, or they may place their absentee ballots in a secure absentee ballot drop box. *Some absentee ballot drop boxes are located outdoors, either for drive-through or walk-up access, and some are indoors at a location like a municipal clerk’s office.*

*DNC v. Wis. State Legislature*, 141 S. Ct. 28, 36 (2020) (Gorsuch J., concurring) (emphasis added).

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<sup>5</sup> Messrs. Teigen and Thom object to any references to these statements by Speaker Vos and then-Majority Leader Fitzgerald on the grounds that “statements by legislators cannot change or add to existing law.” SJ Reply Br. at 6, Jt. App. 467. Our point is not that these statements “control the interpretation of state law,” *id.* at 5, Jt. App. 466, but that they illustrate the widespread bipartisan support for secure, monitored drop boxes that help ensure the safe, convenient, and reliable delivery of sealed, voted absentee ballots “to” clerks and their authorized representatives. *See also* Jt. App. 296 (“clerks in Trump country embraced ballot boxes, too”).

## **B. Procedural history**

The history of this litigation and the cases that preceded it is detailed in the briefs of the WEC and DRW appellants, and will not be repeated here. DSCC adds that it moved to intervene as a defendant in this litigation shortly after Messrs. Teigen and Thom first brought suit, and that the Circuit Court granted its motion to intervene on October 12, 2021. Jt. App. 73-74. DSCC thereafter participated in the summary judgment briefing and argument that led to the order and judgment now on appeal. DSCC raised all of the objections below that it raises here, including that a declaratory judgment on the ballot-assistance arguments would be an unwarranted advisory opinion and that Teigen and Thom lack standing.

The Circuit Court granted Teigen and Thom's summary judgment motion from the bench on January 13, 2022, and followed up with a written order, declaratory judgment, and preliminary injunction on January 20, 2022. *See* Jt. App. 555-71, 639-41. The WEC, DRW intervenor-defendants, and DSCC all promptly filed notices of appeal. The Court of Appeals on January 24 stayed the Circuit Court's relief through the February 15 election. This Court granted Teigen and Thom's petition to bypass on January 28 and left the Court of Appeals' stay in place, but subsequently declined on February 11 to extend that stay beyond February 15.

### **STANDARD OF REVIEW**

Statutory construction presents questions of law subject to de novo review by this Court, without deference to lower courts. *See Waity*

*v. LeMahieu*, 2022 WI 6, ¶ 18, 2022 WL 243950 (Jan. 27, 2022); *State ex rel. Collison v. City of Milwaukee Bd. of Rev.*, 2021 WI 48, ¶ 21, 397 Wis. 2d 246, 960 N.W.2d 1. De novo review also is appropriate because this appeal is from the Circuit Court’s grant of a motion for summary judgment. *Waity*, 2022 WI 6, ¶ 17.

### SUMMARY OF ARGUMENT

1. The Circuit Court’s reading of Wis. Stat. § 6.855 squarely conflicts with Justice Hagedorn’s persuasive reading of that statute in his concurrence in *Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568, which emphasized that “[a]n alternative absentee ballot site . . . must be a location not only where voters may return absentee ballots, but also a location where voters ‘may request and vote absentee ballots.’” 2020 WI 91, ¶ 56 (concurring opinion). Drop boxes do not qualify as such sites and thus are not regulated or restricted by Section 6.855.

2. Wis. Stat. § 6.87(4)(b)1 requires that an absentee ballot be “delivered in person, to the municipal clerk,” not “to the municipal clerk inside the clerk’s office.” Nothing in the statute restricts clerks from providing voters with opportunities to deliver absentee ballots to clerks and their authorized representatives *outside* of clerks’ offices.

3. There is no statutory requirement that absentee-ballot drop boxes be “staffed” at all times no matter how secure and closely monitored those boxes may be. Voters may use “unstaffed” U.S. mailboxes in returning their voted absentee ballots; drop boxes that are the functional equivalent of U.S. mailboxes are lawful as well.

4. This Court should vacate the Circuit Court’s declaratory judgment invalidating *all* assistance to voters who are unable to mail or deliver their completed absentee ballots unless explicitly authorized by

statute. This part of the decision below is an ill-considered advisory opinion that is unmoored to any developed factual record about ballot-assistance needs and the likely scope and impacts of its application.

5. Mr. Teigen and Mr. Thom do not have standing to pursue this litigation, especially now they have conceded that drop boxes are not *per se* barred under the governing statutes. The question is no longer “whether,” but “under what circumstances” drop boxes may be used. Teigen and Thom have neither “voter standing” nor “taxpayer standing” to pursue a declaratory judgment that seeks, in essence, an advisory opinion on the proper siting, monitoring, and use of drop boxes in all 72 counties and 1,850 municipal voting jurisdictions throughout the state.

## ARGUMENT

### **I. Wisconsin does not prohibit municipal clerks from providing secure drop boxes for voters to use in returning their sealed absentee ballots to clerks.**

#### **A. Wis. Stat. § 6.855 does not govern the location of drop boxes, but applies only to the very different issue of early in-person absentee voting sites.**

The Circuit Court held that Wis. Stat. § 6.855 restricts the location of drop boxes to “the office of the municipal clerk or board of election commissioners” or an “alternate absentee ballot site” designated under the terms and conditions of that section. Tr. 88-90, Jt. App. 558, 564-66; Order at 2, Jt. App. 640. That reading directly conflicts with Justice Hagedorn’s reading of Section 6.855 in *Trump v. Biden*, which emphasized that “[a]n alternative absentee ballot site . . . must be a location not only where voters may return absentee ballots, but also a location where voters ‘may request and vote’ absentee ballots.” 2020 WI 91 ¶ 56 (concurring opinion) (reasoning that “Democracy in the Park”



locations were not early voting sites). If Democracy in the Park sites were not early voting sites in 2020, neither are drop boxes in 2022. Voters may *return* ballots to a drop box, but they cannot “request and vote” absentee ballots from inanimate secure depositories.

Section 6.855 regulates the process known as “early voting” (or “early in-person absentee voting”), in which a voter goes to a designated site, obtains an absentee ballot, marks and seals the ballot, and returns it to the clerk’s authorized representatives before leaving. *See Luft v. Evers*, 963 F.3d 665, 674 (7th Cir. 2020). Early voting involves obtaining, marking, and returning an absentee ballot in a single visit to a single site. “Currently the state allows in-person absentee voting (which is to say, early voting) from 14 days before the election through the Sunday preceding it, without any restriction on the number of hours per day that a municipality may choose to keep its offices open.” *Id.* at 669.

Some history may further help put Section 6.855 into its proper context. From 2005 until late 2018, the provision limited each municipality to a single site “from which electors of the municipality may request and vote absentee ballots” prior to an election. If the municipality had an “alternate absentee ballot site” within the meaning of Section 6.855, “no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners.” It was an either/or proposition: either a municipality could conduct early voting at the clerk’s office, or it could conduct early voting at an appropriate “alternate” site, but it could not do both.

In 2016, the U.S. District Court for the Western District of Wisconsin held this so-called “one-location rule” violated the First and

Fourteenth Amendments to the U.S. Constitution as well as Section 2 of the Voting Rights Act. See *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 931-35, 956 (W.D. Wis. 2016), *order enforced*, 351 F. Supp. 3d 1160 (W.D. Wis. 2019), and *aff'd in part, vacated in part, rev'd in part sub nom. Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020). While that decision was on appeal, the Wisconsin Legislature amended Section 6.855 in December 2018 to provide that a municipality “may designate more than one alternate site”—thereby repealing the one-location rule. Wis. Stat. § 6.855(5). The Seventh Circuit held this part of the appeal was moot since the statute had been amended to give plaintiffs what they sought—multiple early voting sites. *Luft*, 963 F.3d at 674.

A drop box is not an early voting site. It lacks one of the two essential attributes of such a site: absentee voters may “return” a completed ballot to a drop box, but cannot “request and vote” a ballot from one. Wis. Stat. § 6.855(1). Rather, a drop box is a secure receptacle designated by the clerk for the return of absentee ballots *previously* obtained by a voter through the mail and then marked and sealed by the voter before delivery “in person” to the clerk’s drop box.

That is precisely the conclusion reached in 2020 by Justice Hagedorn in his *Trump v. Biden* concurrence. The majority decision (also authored by Justice Hagedorn) held that President Trump’s post-election challenge to the so-called “Democracy in the Park” events in Madison was barred under the doctrine of laches and accordingly did not reach the merits. 2020 WI 91, ¶¶ 10-31. Justice Hagedorn (joined by Justice Ann Walsh Bradley) went on in his separate concurrence to reject President Trump’s argument that these events were “illegal in-

person absentee voting sites that failed to meet the statutory requirements under Wis. Stat. § 6.855.” *Id.* ¶ 55. He reasoned:

An alternative absentee ballot site, then, must be a location not only where voters may return absentee ballots, but also a location where voters “may request and vote” absentee ballots. On the facts before the court, this is not what occurred at “Democracy in the Park” locations. Ballots were not requested or distributed. Therefore, Wis. Stat. § 6.855 is not on point.

2020 WI 91 ¶ 56 (citation omitted). The same conclusion follows here: because absentee ballots are not “requested or distributed” from drop boxes, Section 6.855 “is not on point.”

Justice Hagedorn’s reading is supported by basic canons of statutory construction, including with respect to the fundamental distinction between “and” and “or.” Section 6.855 governs sites where electors “may request and vote absentee ballots *and* to which voted absentee ballots shall be returned” (emphasis added). The use of the conjunctive “and” means that both clauses must be satisfied, whereas the disjunctive “or” means that either clause is sufficient to trigger the statute’s application. *See, e.g., Hull v. State Farm Mut. Auto. Ins.*, 222 Wis. 2d 627, 637, 586 N.W.2d 863 (1998) (“The meaning of ‘or’ is plain: ‘or’ is a connector of alternative choices in a series. In an everyday setting, ‘or’ is interpreted disjunctively.”); *State v. Lossman*, 118 Wis. 2d 526, 537, 348 N.W.2d 159 (1984) (“plain meaning” of “and” is that first element “as well as” second element must be established); *Green Bay Broad. Co. v. Redev. Auth. of Green Bay*, 116 Wis.2d 1, 21, 342 N.W.2d 27 (1983) (“Where two or more requirements are provided in a section and it is the legislative intent that all of the requirements must be fulfilled in order to comply with the statute, the conjunctive ‘and’ should

be used.”), *modified*, 119 Wis. 2d 251, 342 N.W.2d 478 (1984); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012) (“Under the conjunctive/disjunctive canon, and combines items while or creates alternatives.”); 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 21:14 (7th ed. 2007) (similar).

A drop box does not meet one of the two required statutory elements of an “alternate absentee ballot site” and thus is not regulated by Section 6.855, which simply “is not on point” here. *Trump v. Biden*, 2020 WI 91, ¶ 56 (Hagedorn, J., concurring).

Mr. Teigen and Mr. Thom made a variety of policy arguments below for why drop boxes should be regulated under Section 6.855, including to ensure that (1) municipal clerks do not locate drop boxes in “locations politically advantageous to one side or the other” (such as a “union hall” or “party headquarters”); (2) clerks are held to the rules that apply to alternate absentee ballot sites to provide “[n]otice and clear designation of [drop-box] locations”; and (3) Wisconsin does not allow just “*anyone* [to] man a drop box—even *partisan volunteers*.” Plaintiffs’ Summary Judg. Br. at 13-14, Jt. App. 87-88 (emphases added). But these arguments are built on rank speculation and ignore that the challenged WEC guidance memos themselves emphasize the need to use objective, nonpartisan siting criteria; explain the importance of publicizing drop box locations and hours of operation; and instruct that drop boxes be “operated by local election officials.” Jt. App. 20-26. Moreover, a variety of statutes and regulations require what Teigen and Thom describe as “the transparency the public expects of the election process” and prohibit municipal clerks and other election officials from using the machinery of

voting (including the siting and staffing of drop boxes) for partisan advantage. *See* Wis. Stat. § 19.59(1)(br) (“No local public official . . . may . . . provide . . . any service or other thing of value, to or for the benefit of a candidate [or] political party . . .”); *see also* Wis. Stat. §§ 5.05(12)-(13), 7.15(9) (voter education responsibilities of WEC and municipal clerks); WEC, *Election Administration Manual for Municipal Clerks* at 123-39 (Sept. 2020), available at <https://elections.wi.gov/sites/elections/files/2022-02/Election%20Administration%20Manual%20%282020-09%29.pdf>

**B. Wis. Stat. § 6.87(4)(b)1 only requires delivery “to the municipal clerk” or the clerk’s authorized representatives, not “to the office of the municipal clerk.”**

Wis. Stat. § 6.87(4)(b)1 requires voters to mark and return their absentee ballots in sealed envelopes “mailed by the elector[s], or delivered in person, to the municipal clerk issuing the ballot or ballots.” Messrs. Teigen and Thom argue this language requires delivery to occur *inside* the municipal clerk’s office, but the provision says nothing of the sort. It requires “deliver[y] in person, to the municipal clerk,” not “to the municipal clerk inside the clerk’s office.” A court must not “read into the statute words the legislature did not see fit to write.” *Dawson v. Town of Jackson*, 2011 WI 77, ¶ 42, 336 Wis. 2d 318, 801 N.W.2d 316; *see also State ex rel. CityDeck Landing LLC v. Cir. Ct. for Brown Cnty.*, 2019 WI 15, ¶ 33, 385 Wis. 2d 516, 922 N.W.2d 832 (“A fundamental canon of statutory construction provides that “[n]othing is to be added to what the text states or reasonably implies[.]”) (citation omitted).

Section 6.87(4)(b)1’s failure to say anything about “the clerk’s office” contrasts sharply with the many other provisions in Wisconsin’s

election code (Chapters 5-12) that expressly require certain deliveries “to,” or actions “at” or “in,” the “office of the municipal clerk,” the “office of the clerk,” or the “clerk’s office.”<sup>6</sup> Simply put, if the Legislature had

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<sup>6</sup> See, e.g., Wis. Stat. § 5.81(3) (re use of “paper ballots and envelopes voted in person *in the office of the municipal clerk* or voted by mail”); *id.* § 6.15(2)(bm) (procedures regarding “application in person *at the office of the municipal clerk*”); *id.* § 6.18 (“This [application] form shall be returned *to the municipal clerk’s office*.”); *id.* § 6.28(b) (various provisions re registration “*at the office of the municipal clerk*”); *id.* § 6.29(2)(a) (re late registration “*at the office of the municipal clerk* and at the office of the clerk’s agent if the clerk delegates responsibility for electronic maintenance of the registration list to an agent”); *id.* § 6.30(4) (voter registration form “shall be available *in the municipal clerk’s office*”); *id.* § 6.32(2) (re “request that the elector appear *at the clerk’s office* or another registration location”); *id.* § 6.32(3) (re registration “*at the clerk’s office*”); *id.* § 6.35(3) (“Original registration forms shall be maintained *in the office of the municipal clerk* or board of election commissioners at all times.”); *id.* § 6.45(1m) (“any person may copy the registration list *at the office of the clerk*”); *id.* § 6.47(2) (provision regarding “[a] physically disabled individual who appears personally *at the office of the municipal clerk* accompanied by another elector of this state”); *id.* § 6.50(1) (return of signed statement “*to the office of the municipal clerk*”); *id.* § 6.55(2)(cm) (registration “*at the office of the municipal clerk* of the municipality where the elector resides”); *id.* § 6.56(4) (re change in registration status “unless the person contacts *the office of the clerk* to clarify the matter”); *id.* § 6.855 (re notices to be “displayed *in the office of the clerk*”); *id.* § 6.86(1)(a)2 (re absentee ballot applications made “[i]n person *at the office of the municipal clerk* or at an alternate site under s. 6.855, if applicable”); *id.* § 6.86(3)(c) (application and form “may be filed in person *at the office of the municipal clerk*”); *id.* § 6.87(3)(a) (re delivery by the clerk “to the elector personally *at the clerk’s office*”); *id.* § 6.87(4)(b)4 (re “voting *at the office of the municipal clerk*”); *id.* § 6.875(4)(ar)1 (option of voter who lives in residential care facility or qualified retirement home to vote “in person *at the office of the municipal clerk* or board of election commissioners”); *id.* § 6.88(1) (ballot-storage procedures that apply “[w]hen an absentee ballot arrives *at the office of the municipal clerk*”); *id.* § 6.97(3)(b) (requirement to provide proof of identification “*at the office of the municipal clerk* or board of election commissioners no later than 4 p.m. on the Friday after the election”); *id.* § 7.41(1) (right of public to “be present at any polling place, *in the office of any municipal clerk* whose office is located in a public building on any day that absentee ballots may be cast in that office, or at an alternate site under s. 6.855 on any day that absentee ballots may be cast at that site”); *id.* § 7.53(1)(b), (2)(d) (re filing of certain documents “*in the office of the municipal clerk*”); *id.* § 8.10(6)(c) (filing of certain nomination papers “*in the office of the municipal clerk* or board of election commissioners”); *id.* § 12.03(1)-(2) (various prohibitions against “electioneering *in the municipal clerk’s office* or at an alternate site under s. 6.855” during voting hours); *id.*

wanted to require absentee ballots to be returned only “to the clerk’s office,” it would have said so expressly, as it has repeatedly in these related statutes. Instead, the Legislature required only “deliver[y] in person, to the municipal clerk,” without restricting where that “delivery” may occur.

It is an elementary principle of statutory construction that “[i]f a word or words are used in one subsection but are not used in another subsection, [a court] must conclude that the legislature specifically intended a different meaning.” *Responsible Use of Rural and Agric. Land (RURAL) v. Pub. Serv. Comm’n of Wis.*, 2000 WI 129, ¶ 39, 239 Wis. 2d 660, 619 N.W.2d 888 (citation omitted); *see also James v. Heinrich*, 2021 WI 58, ¶¶ 18-20, 397 Wis. 2d 517, 960 N.W.2d 350 (applying *expressio unius* and “related statutes” canons of construction); *Gister v. Am. Fam. Mut. Ins.*, 2012 WI 86, ¶ 33, 342 Wis. 2d 496, 818 N.W.2d 880 (“Where the legislature includes a word in one provision and omits it from a similar, parallel provision within the same statute, we are even more reluctant to diminish the independent significance of the word.”). The Legislature knows how to specify that certain deliveries be made “to,” or that certain actions take place “at” or “in,” the “clerk’s office” when that is what it means. It failed to include such a limitation here. That should end the matter.<sup>7</sup>

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§ 12.035(3)(c) (prohibition against posting or distribution of “any election-related material *at the office of the municipal clerk* or at an alternate site under s. 6.855 during hours that absentee ballots may be cast”). All emphases in the parentheticals in this footnote have been added.

<sup>7</sup> *See also Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) (“A familiar principle of statutory construction . . . is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions

Messrs. Teigen and Thom argue that Section 6.87(4)(b)1 should be read as *implicitly* requiring that delivery to the clerk occur *inside* the clerk’s office itself because another provision—Section 6.855, discussed above—refers to an “alternate absentee ballot site” as a site “to which absentee ballots *shall be returned*”; they believe “the obvious implication” is that the clerk’s office itself “is the default location ‘to which absentee ballots *shall be returned*.’” SJ Reply Br. at 6, Jt. App. 467-68. The response is that Section 6.87(4)(b)1 requires delivery to a *person* (the clerk) rather than a *place* (the clerk’s office), and the Legislature knows how to say “the clerk’s office.” The whole point of the relevant canons is to avoid adding “implied” terms that are used “expressly” in related parts of the same statute.

Thus, Section 6.87(4)(b)1 authorizes “deliver[y] in person, to the municipal clerk” whether that “delivery” takes place inside the clerk’s office, at a staffed curbside or drive-through site, or elsewhere (including a city park, if the city clerk has designated it as a site for the in-person delivery of absentee ballots to the clerk’s authorized representatives).

**C. Wis. Stat. § 6.87(4)(b)1 does not prohibit unstaffed drop boxes in all circumstances.**

Nor is there anything in Wis. Stat. § 6.87(4)(b)1 requiring that absentee-ballot drop boxes be “staffed” at all times no matter how secure and closely monitored those boxes may be. Consider a well-lit after-hours depository drawer on the outside wall of the clerk’s office under

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of the same statute.”); *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (citation omitted).



video surveillance, similar to those used by other government offices and banks to receive payments and deposits, which are emptied every morning by the clerk's authorized representatives. Many drop boxes used throughout the state in 2020 were, in fact, "repurpos[ed]" preexisting "municipal return slots" already "set up for secure collection of payment and materials," such as tax and utility payments. Jt. App. 23-24, 214. If such infrastructure is trustworthy enough for the safe deposit of public funds, they should be sufficient for the safe delivery of returned absentee ballots if the clerk designates them for that use. WEC encouraged use of such preexisting "infrastructure," subject to numerous recommendations regarding proper signage, security, oversight by election officials, and chain-of-custody procedures. Jt. App. 23-26.

Mr. Teigen and Mr. Thom have offered no reason to believe such depositories might be any less secure and reliable than a staffed drop box during business hours. Consider also that one of the authorized methods for returning an absentee ballot is by placing it into a U.S. mailbox, which typically is "unstaffed" and often is located in poorly lit, remote areas. There is no reason why a secure, locked metal drop box cemented into the ground cannot be just as secure as a U.S. mailbox. Indeed, WEC's emphasis on using video surveillance cameras and law enforcement monitoring suggests that outdoor unstaffed drop boxes often will be much *more* secure and reliable than many U.S. mailboxes. Nothing in the statutes *requires* the staffing of drop boxes that are the

functional equivalents of U.S. mailboxes and demonstrably safe from tampering.<sup>8</sup>

Of course, many drop boxes *are* staffed by clerks’ “authorized representatives,” many of whom are “election officials” within the meaning of Wis. Stat. §§ 5.02(4e) and 7.30. Indeed, the challenged WEC guidance memos instruct that drop boxes are to be “operated by local election officials.” Jt. App. 23. Even the “Democracy in the Park” events that former President Trump complained about were all staffed by “[s]worn election officials,” who were the only individuals authorized to collect sealed ballots and were required to maintain strict “chain of custody” over all ballots collected. Jt. App. 241-42; *see also Trump v. Biden*, 2020 WI 91, ¶ 19 (“sworn city election inspectors collected completed absentee ballots” at these events). Messrs. Teigen and Thom have offered no evidence that municipal clerks are allowing people other than “election officials” or “election inspectors” to collect sealed ballots

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<sup>8</sup> Teigen and Thom argued in the Circuit Court that U.S. mailboxes are safer than ballot drop boxes because “mailboxes may or may not contain ballots at any given time,” and thus are less of a target than ballot drop boxes; that “mailboxes are also operated by an official agency of the U.S. Government”; and that “it is a crime to use the mail to commit fraud.” SJ Reply Br. at 5, Jt. App. 466. But given the growing reliance on absentee voting, it is readily foreseeable that U.S. mailboxes may contain “lots” of absentee ballots in the days leading up to an election. *Id.* And the fact that a U.S. mailbox is “operated by an official agency of the U.S. Government” is irrelevant; ballot drop boxes are operated by agencies of the municipal government that are just as trustworthy and competent as federal agencies. And although “it is a crime” to tamper with mailboxes, it is *also* a crime—and a Class I felony at that—to tamper with ballot boxes or otherwise interfere with the receipt and tabulation of voters’ absentee ballots. *See* Wis. Stat. §§ 12.13(3)(L), 12.60(1)(c) (making it a Class I felony to, *e.g.*, “conceal, withhold or destroy ballots or ballot boxes; willfully, fraudulently or forcibly add to or diminish the number of ballots legally deposited in a ballot box”); *see also id.* §§ 12.13(3)(c), 12.60(1)(c) (making it a felony to “fail to deliver, after having undertaken to do so, official ballots prepared for an election to the proper person, or prevent their delivery within the required time, or destroy or conceal the ballots”).

and remove them from drop boxes, and any such instances would *violate* WEC's guidance.

**II. This Court should not render an advisory opinion on the “ballot assistance” challenges.**

Mr. Teigen and Mr. Thom also complain that WEC's March 31, 2020 guidance memo—issued just as the COVID-19 crisis was hitting Wisconsin, shortly after Governor Evers' first stay-at-home order while absentee voting was underway for the April 7 primary—contained a single sentence stating that, in the context of what was happening, “[a] family member or another person may also return the ballot on behalf of the voter.” Jt. App. 20. Teigen and Thom call this “ballot harvesting,” Plaintiffs' SJ Br. at 6, Jt. App. 80, a derogatory term generally used to imply malfeasance (e.g., fraudulently voting on behalf of another), but provide no reason to believe that any such fraudulent activity has occurred in Wisconsin.

DSCC agrees fully with the other appellants that Wisconsin's election statutes do not prohibit an elector from asking a spouse, other family member, friend, neighbor, or other authorized agent to take the elector's completed, sealed absentee ballot and either mail the ballot or return it to the clerk on behalf of the elector. DSCC joins in the other appellants' arguments and urges this Court to vacate what will otherwise be an unprecedented statewide ban on innocuous everyday voter assistance activities by family, friends, and neighbors. Such a ban would be a disaster for every homebound absentee voter in the state along with voters whose ballots may be subject to mail delays beyond their control, or who are otherwise unable to mail or return their ballots themselves for entirely legitimate reasons. Such a ban would outright disenfranchise these voters and, as the WEC and DRW briefs

demonstrate, violate federal and state voting rights guarantees in numerous respects. “[E]lection laws must not destroy or impair the right to vote.” *League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶ 50, 357 Wis. 2d 360, 851 N.W.2d 302. Yet an outright ban on assisting voters in returning their ballots unless they fall into one of several narrow categories would do precisely that. See also *Sommerfeld v. Bd. of Canvassers of City of St. Francis*, 269 Wis. 299, 303, 69 N.W.2d 235 (1955) (“If our statute is construed to mean that the voter shall himself mail the ballot or personally deliver it to the clerk, then the statute would defeat itself in the case of those who are sick or physically disabled. They would be unable to mail ballots except through an agent. Having made provision that these unfortunate people can vote, we cannot believe that the legislature meant to disenfranchise them by providing a condition that they could not possibly perform.”).

The only jurisdictional “hook” for this sweeping and unprecedented declaratory ruling is a single sentence in the WEC’s March 31, 2020 guidance letter issued at the onset of the pandemic under lock-down conditions only a week before the spring election. The Circuit Court’s ruling will disenfranchise numerous electors for a variety of reasons and in a variety of circumstances having nothing to do with the March 2020 guidance. This part of the judgment below, in particular, is simply an advisory opinion that is untethered to any concrete facts or controversies. See, e.g., *State ex rel. Collison v. City of Milwaukee Bd. of Rev.*, 2021 WI 48, ¶ 46, 397 Wis.2d 246, 960 N.W.2d 1; *State v. Grandberry*, 2018 WI 29, ¶ 31 n.20, 380 Wis. 2d 541, 910 N.W.2d 214; *State v. Steffes*, 2013 WI 53, ¶ 27, 347 Wis. 2d 683, 832 N.W.2d 101. This Court “is not, in the main, an advice-giving body,” and its “institutional role” is not to “step

in and answer every unsettled and interesting legal question with statewide impact.” Order at 3, *Fabick v. Wis. Elections Comm’n*, No. 2021AP428-OA (Wis. June 25, 2021).

### **III. Messrs. Teigen and Thom lack standing.**

For the reasons set forth above, Messrs. Teigen and Thom are wrong on the merits. But this Court need not reach those questions because, as DSCC has argued from the outset of this litigation, Teigen and Thom lack standing. That became especially clear once they conceded that drop boxes *are* legal in some situations; now the question is where and under what circumstances, which can vary enormously among Wisconsin’s 72 counties and 1,850+ municipal voting jurisdictions.

DSCC briefed and argued several objections to standing in opposing summary judgment. Yet the Circuit Court simply held that it was “satisfied that standing is controlled by Section 227.40, declaratory judgment proceedings,” and that Teigen and Thom had standing because venue was proper. Tr. 79, 81, Jt. App. 555, 557. But Section 227.40(1) provides that “[t]he court shall render a declaratory judgment . . . only when it appears . . . that the rule or guidance document or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiff.” Section 227.40 does not confer standing, but requires it.

Messrs. Teigen and Thom are simply two voters and taxpayers who now concede that clerks may sometimes lawfully use secure drop boxes, but who seek to exercise a roving commission through this litigation to micromanage the siting, operation, and monitoring of every drop box throughout the state to ensure that all such boxes conform to their

sensibilities. We are unaware of any case holding that individual voters in one municipal voting jurisdiction have standing to challenge the voting practices and procedures in any of the other 1,850+ voting jurisdictions around the state, and Teigen and Thom cite to none.

Indeed, this Court in June 2021 questioned the ability of “a resident of Waukesha County” to bring suit against the Cities of Milwaukee and Madison “for how they conduct their elections.” Order at 2, *Fabick v. Wis. Elections Comm’n*, No. 2021AP428-OA (Wis. Jun. 25, 2001). To be sure, this was in the context of whether to grant an original action in the face of a statutory objection not in issue here (Wis. Stat. § 5.06). But the Court’s language about the standing requirement is on point:

The Wisconsin Supreme Court is not, in the main, an advice-giving body. We generally do not take requests from government officials asking us for a legal green light or red light for a given course of action, nor are we on-call to answer questions from citizens, legislators, or executive branch officials whenever the answer to a statutory question is unclear. Rather, we are a case-deciding body. We decide disputes between parties. Among other things, this means that someone making a claim must have some recognized legal interest he or she seeks to vindicate, and standing to raise that claim.

*Id.* at 3-4. The Court also emphasized that its “duty to declare the law arises in the context of our duty to decide cases—genuine and ripe disputes between parties with standing to raise them. It is not our institutional role to step in and answer every unsettled and interesting legal question with statewide impact.” *Id.* at 4.

Wisconsin’s rules of standing are broad, but they are not “limitless” or eliminate “the concept of standing as a meaningful requirement.” *Wis.*

*Mfrs. & Com. v. Evers*, 2021 WI App 35, ¶ 32, 398 Wis. 2d 164, 960 N.W.2d 442 (“[I]f we were to adopt the limitless version of judicial economy standing argued by [plaintiffs], the concept of standing as a meaningful requirement that must be satisfied would be effectively eliminated.”); *see also Krier v. Vilione*, 2009 WI 45, ¶ 20, 317 Wis. 2d 288, 766 N.W.2d 517 (rejecting standing arguments that would open state courts to a “universe of entities or people . . . without bounds”). Messrs. Teigen and Thom present no more than a “generalized grievance[]’ about the administration” of the election statutes in question. *Cornwell Pers. Assocs., Ltd. v. Dep’t of Indus., Lab. & Hum. Rels.*, 92 Wis. 2d 53, 62, 284 N.W.2d 706 (Ct. App. 1979). They “claim[] only harm to [their] and every citizen’s interest in proper application of [these] laws,” and the relief they seek “no more directly and tangibly benefits [them] than it does the public at large.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573-74 (1992).

That is not sufficient for standing. Teigen and Thom have not demonstrated “a *personal stake* in the outcome of the controversy” separate and apart from the public at large, nor have they shown they have “suffered or [are] threatened with an injury to an interest that is *legally protectable*.” *Marx v. Morris*, 2019 WI 34, ¶ 35, 386 Wis. 2d 122, 925 N.W.2d 112 (emphasis added); *Krier*, 2009 WI 45, ¶ 20 (emphasis added). Nor have they established an “injury in fact” to a personal interest “within the zone of interests to be protected or regulated by the statute[s] . . . in question.” *Coyne v. Walker*, 2015 WI App 21, ¶ 7, 361 Wis. 2d 225, 862 N.W.2d 606, *aff’d*, 2016 WI 38, 368 Wis. 2d 44, 879 N.W.2d 520. What they really seek is an advisory opinion on how the relevant statutes should be applied in various hypothetical scenarios that may arise somewhere around the state. *See Blasing v. Zurich Am.*

*Ins.*, 2014 WI 73, ¶ 73, 356 Wis. 2d 63, 850 N.W.2d 138 (“This court does not issue advisory opinions based on non-existent facts.”); *Steffes*, 2013 WI 53, ¶ 27; p. 36 *supra*.

None of the specific standing arguments advanced by Messrs. Teigen and Thom come close to satisfying these standards. *First*, in their complaint, Teigen and Thom claimed they *might* use drop boxes to cast their own ballots in the future in reliance on the WEC’s advice, but they worried that if the WEC is wrong “their vote may be illegal and not counted.” Compl. ¶ 52, Jt. App. 16. But neither of them appears to live in a voting jurisdiction that uses drop boxes outside of clerks’ offices, so they do not have this option, and Mr. Teigen also testified he will not use drop boxes even if such boxes are legal and available. Jt. App. 231, 257-58. And in any event, Teigen, Thom, and any other voters thinking about using drop boxes in reliance on their local clerks’ directions can be confident their votes will *not* be retroactively invalidated. This Court held after the 2020 election that courts may *not* strike the ballots of voters who simply “dropped off their ballot[s] where their local election officials told them they could.” *Trump*, 2020 WI 91, ¶ 27 (*re* Madison’s “Democracy in the Park” ballot-collection program: “Striking these ballots would disenfranchise voters who did nothing wrong when they dropped off their ballot where their local election officials told them they could.”). Teigen and Thom thus are at no risk of disenfranchisement for doing what their local election officials tell them they may do.

*Second*, Messrs. Teigen and Thom complain the “value” of their own votes will be “diminishe[d]” if even a single voter—anyone, anywhere in the state—is able “to vote other than in strict compliance with the law.” Compl. ¶ 53, Jt. App. 16. To be clear, they do not limit



this claim to voters who are *unqualified* to vote in Wisconsin, nor do they provide any credible reason to believe these entirely hypothetical voters who voted “other than in strict compliance with the law” would actually cause any injury to Teigen and Thom themselves. To the contrary, it is equally likely that any such voters may vote for the same candidates who Teigen and Thom support, which would seem to benefit, not harm them. See Chris Rickert, *Despite objections from conservatives, clerks in Trump country embraced ballot drop boxes, too*, Wis. State J. (Nov. 4, 2021), reprinted as Jt. App. 217-32. This identical theory of “vote dilution” was pushed in many lawsuits that attempted to discredit or undo the November 2020 election results, and courts throughout the country resoundingly rejected them.<sup>9</sup>

This Court has cautioned that it is “troubled” by claims of “broad general voter standing,” holding that such claims will be “fit for adjudication” only in “*unique circumstances*” not present here.

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<sup>9</sup> See, e.g., *Hotze v. Hudspeth*, 16 F.4th 1121, 1124 (5th Cir. 2021) (voters’ claim “that drive-thru voting hurt the ‘integrity’ of the election process” was “far too generalized to warrant standing”); *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020) (claimed injury to the right “to require that the government be administered according to the law” is “a generalized grievance” that “cannot support standing”; voter’s “interest in compliance with state election laws is [no] different from that of any other person”), *cert. denied*, 141 S. Ct. 1379 (2021); *Bognet v. Sec’y Commonwealth of Pa.*, 980 F.3d 336, 356-57 (3d Cir. 2020) (claimed “vote dilution” resulting from counting of allegedly improper ballots is a “paradigmatic generalized grievance that cannot support standing”; “[t]he courts to consider this issue are in accord” that “[s]uch an alleged ‘dilution’ is suffered equally by all voters and is not ‘particularized’ for standing purposes”), *vacated as moot sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021); *Feehan v. Wis. Elections Comm’n*, 506 F. Supp. 3d 596, 608-09 (E.D. Wis. 2020) (rejecting “theory that a single voter has standing to sue as a result of his vote being diluted by the possibility of unlawful or invalid ballots being counted”; “plaintiff’s alleged injuries are injuries that any Wisconsin voter suffers if the Wisconsin election process” allows illegal votes to be cast, as opposed to “a particularized, concrete injury”), *appeal dismissed*, Nos. 20-3396, 20-3448, 2020 WL 9936901 (7th Cir. Dec. 21, 2020).

*McConkey v. Van Hollen*, 2010 WI 57, ¶ 17, 326 Wis. 2d 1, 783 N.W.2d 855 (emphasis added). *McConkey* involved a voter challenge to the process by which a constitutional amendment was adopted; the dispute involved a straight-up-or-down question of law. *Id.* ¶ 18. Teigen and Thom here concede they no longer challenge *all* drop boxes, just some boxes in some circumstances, which invites a wide-ranging inquiry into local election administration throughout the state. Their voting rights are in no sense “diluted” by other voters’ reliance on carefully monitored secure drop boxes under local municipal clerks’ jurisdiction, custody, and control.

*Third*, Messrs. Teigen and Thom claim “taxpayer standing,” reasoning that “WEC spent substantial staff time and resources to prepare, promulgate and distribute” the two challenged memos. Compl. ¶ 55, Jt. App. 17. But taxpayer standing does not arise just because a challenged memo was prepared by state employees on state time using state resources; that would give any taxpayer standing to challenge any guidance issued by any state employee on any topic. Taxpayer standing requires proof of *expenditures* made as the result of the allegedly illegal guidance. “[I]t must be alleged that the complaining taxpayer and taxpayers as a class have sustained, or will sustain, some pecuniary loss” separate and apart from the public as a whole. *S.D. Realty Co. v. Sewerage Comm’n of Milwaukee*, 15 Wis. 2d 15, 21, 112 N.W.2d 177 (1961). Teigen and Thom must demonstrate an “illegal *disbursement*” of state taxpayer funds to carry out the challenged government decision. *Id.* at 22 (emphasis added) (citation omitted). There must be “a greater expenditure of public funds” caused by the challenged decision, resulting “either in the governmental unit having less money to spend for

legitimate governmental objectives, or in the levy of additional taxes to make up for the loss resulting from the expenditure.” *Id.* Teigen and Thom have neither alleged nor proved any expenditure of state taxpayer funds pursuant to the two challenged WEC guidance memos, and WEC’s acts of providing guidance were not unlawful. To the contrary, WEC is statutorily charged with providing guidance to local election officials. *See Wis. Stat. § 5.05.*

The most recent application of Wisconsin’s taxpayer standing doctrine was in *Fabick v. Evers*, 2021 WI 28, 396 Wis. 2d 231, 956 N.W.2d 856, in which this Court struck down two of Governor Evers’ declarations of public health emergencies due to the pandemic. The Court held that, “[a]s a taxpayer, under our well-established law, [petitioner] has a legal interest (should taxpayer standing be satisfied) to contest governmental actions *leading to an illegal expenditure of taxpayer funds.*” 2021 WI 28, ¶ 10 (emphasis added). The Court found “the National Guard had been deployed pursuant to the emergency declarations,” resulting in an “expenditure of taxpayer funds” that gave the taxpayer-petitioner standing to challenge the Governor’s emergency declarations. *Id.* ¶ 11. Here, Mr. Teigen and Mr. Thom have neither alleged nor proved a cognizable “expenditure” of state taxpayer funds necessary to establish taxpayer standing.<sup>10</sup>

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<sup>10</sup> The majority and dissenting opinions in *Fabick* emphasize the “expenditure” must be of *state* taxpayer funds in order to have “taxpayer standing” in a Wisconsin state court. The dissent argued there was no state taxpayer standing because of a “new policy” by the federal government providing “100 percent federal reimbursement for states’ National Guard expenses,” so that state taxpayers would not have to foot the bill for these expenses. 2021 WI 28, ¶ 104 (Ann Walsh Bradley, J., dissenting); *see id.* ¶¶ 89-105. The majority agreed there must be an expenditure of *state* taxpayer

## CONCLUSION

DSCC respectfully asks that this Court to reverse the Circuit Court's Jan. 20, 2022 Order and Final Judgment.

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funds, but concluded that state taxpayer funds “have already been spent in support of National Guard deployments pursuant to” the Governor’s orders, and that there was an “imminent threat of unreimbursed costs” that would be borne by state taxpayers. *Id.* ¶ 11 n.5. Thus, WEC’s assistance in distributing *federal* CARES Act funds and grants to municipal governments seeking to purchase and improve drop boxes does not create *state* taxpayer standing. *See* Jt. App. 113, 117-18.

Dated this 17th day of February, 2022.

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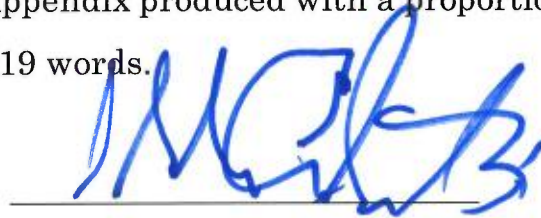
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**CERTIFICATION BY ATTORNEY**

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,019 words.



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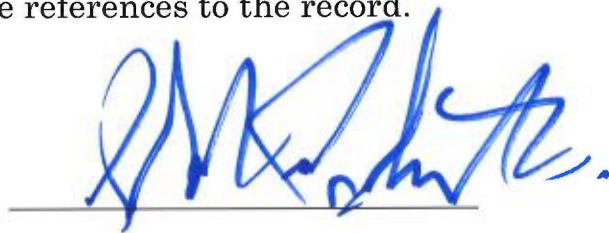
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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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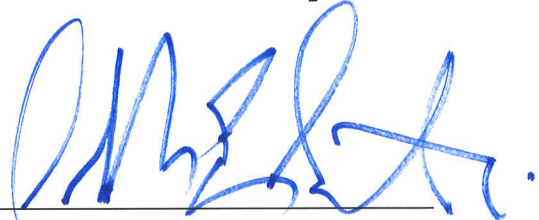
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### CERTIFICATE OF SERVICE

I certify that on this 17th day of February, 2022, I caused a copy of this brief to be served upon counsel for each of the parties via e-mail.

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Charles G. Curtis, Jr.

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